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STATE OF MICHIGAN
IN THE 14TH CIRCUIT COURT
FOR THE COUNTY OF MUSKEGON

* * *

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff

File #14-64458-FC

V

DEREK JAMES RAINBOLT,

Defendant.



ORIGINAL

MOTION IN LIMINE

BEFORE THE HONORABLE WILLIAM C. MARIETTI,

Muskegon, Michigan, on Friday, October 3, 2014.

APPEARANCES:

For the Plaintiff: Christina E. Johnson

For the Defendant: Paula Baker

CALENDARED

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NANCY A. WATERS
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(Videotape, 10-03-14; 3:08:47)

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WITNESSES: PEOPLE PAGE

None.

WITNESSES: DEFENDANT

None.

EXHIBITS: identified received

None.

(Videotape, 10-03-14; 3:08:47)

1 THE COURT: Okay, we're back again on People
2 versus Rainbolt. You have a motion now, Ms. Johnson?

3 MS. JOHNSON: Yes, your Honor. I don't typically
4 file motions in limine like this as the Court knows;
5 however, I felt in this case it was necessary to file a
6 motion in limine to enforce a few points of law prior to
7 trial based on some conversations I've had with Counsel.
8 The first being the rape shield law. Specifically there
9 are a couple of incidences that I want to make sure the
10 jury -- stay out of hearing of the jury based on the rape
11 shield law. The first is that at one point our victim was
12 caught with her pants down with her step-sister. This was
13 reported to CPS and it was unsubstantiated. Two points on
14 that. I think the behavior is covered by the rape shield
15 and I think the lack of substantiation by the CPS is
16 hearsay that does not have an exception.

17 The second instant would be the same victim was
18 caught kissing with her same step-sister. My
19 understanding is both went to counseling and it was ruled
20 just a case of sexual curiosity. Again, I think it's
21 protected by the rape shield law and any outcome of that
22 is protected as hearsay without an exception.

23 And finally I also believe there may be some
24 allegations of our victim looking at pornographic
25 material, which again is protected by the rape shield.

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1 THE COURT: Okay. Ms. Baker, anything you want
2 to say?

3 MS. BAKER: Well, I think that the three
4 instances that are being brought to the Court's attention
5 do not fall within the rape shield statute in that not one
6 of them involves the sexual conduct of the victim in this
7 case. I don't think you can say that being found with her
8 pants down is sexual conduct.

9 THE COURT: Well, then why is it relevant?

10 MS. BAKER: Well, the thing that's relevant to is
11 that she indicated she set -- she made a disclosure that
12 she was going to show her step-sister or cousin a game
13 that her dad had taught her and it was determined to be
14 unfounded and unsubstantiated after an investigation.
15 That's the relevance of that particular incident.

16 THE COURT: Wait a minute. What is the -- so
17 what exactly would you propose to show or what evidence --
18 what precise evidence you talking about presenting then?

19 MS. BAKER: What's the basis for presenting that?

20 THE COURT: No. What I guess I need to know, the
21 -- you're gonna tell the -- you're gonna cross-examine the
22 victim, I take it.

23 MS. BAKER: Yes.

24 THE COURT: And say isn't it a fact that you were
25 caught with your pants down or something, is that -- is

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1 that it?

2 MS. BAKER: I think that that would be the
3 question, yes.

4 THE COURT: Okay. And you're objecting to that.
5 Now why does the answer either -- let's say she says yes,
6 I was caught with my pants down. What is that relevant
7 to?

8 MS. BAKER: Well, your Honor, it goes back to
9 establishing this victim has sexual knowledge that
10 predates this allegation.

11 THE COURT: How does having her pants down show
12 she has sexual knowledge? I mean, she pulls her pants
13 down every time she goes to the bathroom.

14 MS. BAKER: I understand, but it was investigated
15 as a sexual abuse investigation, your Honor, based on the
16 statements that were made. I don't have the -- I'm basing
17 this on information and belief because it's very briefly
18 addressed in this report that was provided to me. I asked
19 for a subsequent report, it has not been provided to me,
20 and that I think when I requested it it prompted this
21 motion.

22 THE COURT: Well, I don't -- based on the fact
23 that she had her pants down doesn't seem to me to be
24 relevant to anything here, so regardless of whether the
25 rape shield statute applies, I don't find it relevant, so

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1 I'm not gonna admit it on that basis. Now the other
2 matter was what? Kissing her sister or something?

3 MS. JOHNSON: She's caught kissing with her
4 sister, her step-sister.

5 MS. BAKER: Her step-sister.

6 MS. JOHNSON: They both went into counseling for
7 that and it was ruled just simple childhood curiosity by
8 the counselors is the information that we got in the
9 reports.

10 THE COURT: Okay. And so you want to bring that
11 out to show, Ms. Baker?

12 MS. BAKER: Again that there's sexual knowledge
13 that existed before this particular incident, alleged
14 incident.

15 THE COURT: Well, these were -- how old were
16 these kids?

17 MS. JOHNSON: I don't believe the reports are
18 even clear as to how old they were at the time.

19 MS. BAKER: It was a couple -- I want to say it
20 was before 2011 according to the report.

21 THE COURT: Okay. So how old would --

22 MS. BAKER: She would have been like, I think,
23 11, 12, 13, that age range.

24 MS. JOHNSON: The 2011-2012 school year she was
25 13 to 14. So January 2011 she turned 13.

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1 THE COURT: All right. So she would have been 12
2 or 13 you're saying. Now this shows -- I mean, this shows
3 her knowledge of sexual activity. I mean, was there --
4 again, you know, I'm at a bit of a disadvantage here. I
5 don't know what is alleged specifically other than
6 penetration was alleged that the Defendant involved
7 himself with the victim. Can you tell me that? Maybe --
8 I don't know is all I'm saying. I mean, was kissing
9 involved?

10 MS. JOHNSON: No, kissing was not involved in
11 this incident. It was he had her take her pants off, he
12 took his pants off, and he asked her to get on top of him
13 and he penetrated her from below, and she does not
14 disclose any kissing.

15 THE COURT: I find it irrelevant. What's the
16 next thing?

17 MS. JOHNSON: The victim viewing pornographic
18 material.

19 THE COURT: Okay. Now you're gonna -- that was
20 how -- this was recently to the event that occurred or --

21 MS. JOHNSON: Judge, this comes -- the only
22 reference I can find from this is in the Defendant's
23 statements so -- and there is not any timeline that I
24 could see in that, so I brought it up kind of
25 precautionarily because I don't think it's relevant to the

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1 jury and I don't think -- or I think it is protected by
2 the rape shield, but I don't know the details of what
3 would be disclosed, so I'd ask for a proffer of what would
4 be testified to in that regard.

5 THE COURT: Well, I guess I am going to have know
6 what you have on that, Ms. Baker, before I could
7 (indistinguishable.)

8 MS. BAKER: Well, I'm -- I know that it's been
9 referred to in the protective services report provided to
10 me by the People, in which the mother indicated that she
11 -- that her daughter had had lying issues and has been
12 found looking at pornographic pictures. That's a
13 statement straight out of the CPS report related to this
14 investigation.

15 THE COURT: Okay. So it would have to have
16 occurred --

17 MS. BAKER: Before the disclosure.

18 THE COURT: Before the disclosure, but would it
19 have to have occurred before the event itself? In other
20 words, you're trying to show that she has knowledge of
21 sexual activity --

22 MS. BAKER: -- that predates this alleged
23 incident, your Honor.

24 THE COURT: Yeah, but we don't know that yet;
25 right?

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1 MS. BAKER: I don't based on -- this is the
2 information I have.

3 THE COURT: Well, I guess I can't rule on that
4 until I know more.

5 MS. BAKER: And furthermore I'd place it on the
6 record that looking at pornography does not fall within
7 the rape shield statute.

8 MS. JOHNSON: I would just ask, I guess, for a
9 relevance argument that we question, take a moment to
10 question this witness outside of the hearing of the jury
11 as to this issue so the Court can determine the relevance
12 before the bell is rang.

13 THE COURT: Yeah, is she here?

14 MS. JOHNSON: No, she's not here. She will be
15 present later this afternoon though. I have an
16 appointment with her in my office.

17 THE COURT: Okay. Well, let's just make it clear
18 there can be no mention of that until I've made a ruling,
19 so just ask -- and we can do that sometime during the
20 trial, we can iron that out, but it isn't anything you're
21 gonna have to -- you're going to get into in voir dire or
22 anything so ...

23 MS. BAKER: No.

24 THE COURT: Now I do want to rule on the other
25 motion, the motion that we had here earlier.

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1 MS. JOHNSON: Judge, if I may, that was only the
2 first half of my motion, and may I apologize for not
3 addressing it all at once.

4 THE COURT: Oh.

5 MS. JOHNSON: I also want to enforce the rule
6 against prior acts of lying from the victim under MRE 608.
7 I know Coun -- and I'm not fully aware of everything that
8 Counsel may or may not get into with her witnesses, but
9 there's been much talk in this case about the victim's
10 credibility and there are certain ways that that can be
11 addressed. I want to make sure that they're only
12 addressed in lawful ways so that no extrinsic evidence of
13 specific acts of lying are offered for evidence.

14 THE COURT: You're just talking about her
15 character, her reputation for telling the truth?

16 MS. JOHNSON: Reputation is admissible.

17 THE COURT: An opinion.

18 MS. JOHNSON: An opinion, yes; however, specific
19 extrinsic evidence of acts is not.

20 THE COURT: Okay. Well, it sounds like you --
21 that's what you're looking for is her mother is going to
22 say she's got a history of lying or something?

23 MS. BAKER: Well, your Honor, I think that 60 --

24 THE COURT: Which I think would be admissible.

25 MS. BAKER: 608 does allow if the Court

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1 determines that it affects her or shows charac -- any
2 character for untruthfulness and in this particular case
3 we do have that this family had a family meeting well
4 before this alleged incident in which they all got
5 together and talked about this young lady lying and I
6 believe it's related to her being caught lying at school,
7 and so they had created a family plan involving my client,
8 his girlfriend, the victim's mother, and her stepfather,
9 and all the children were present. So this whole family
10 got together to address this victim's lying behavior. So
11 I think it is relevant.

12 THE COURT: I do, too. I think --

13 MS. BAKER: I think it -- and I think that if
14 there are, then I should be able to go into the extrinsic
15 evidence of that particular behavior.

16 THE COURT: You can't go into specific acts of
17 lying but if you want to offer testimony from family
18 members who offer the opinion that this girl was not
19 telling the truth, you know, was not a truthful person
20 back then or whenever this happened, I'll allow you to do
21 that, but I'm not gonna get into she lied about, you know,
22 Sammy Smith lookin' up her dress at school; okay?
23 We're --

24 MS. BAKER: Well, here's the one specific
25 incident that I do think needs to be addressed. This

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1 young lady, according to her mother in this same report,
2 said that she set up a fake profile on Facebook as a boy
3 and was establishing relationships with these young girls
4 all over the state and the country, and that the mom then
5 had to go through and say this was a lie. I think that
6 is -- that goes towards this young lady's truthfulness and
7 I think we should be able to bring that to the jury to
8 show that she does have this -- these specific acts that
9 go towards her truthfulness and lack of it.

10 THE COURT: Well, I didn't think you are allowed
11 to get into specific acts but maybe I have to reread it.

12 MS. BAKER: 608 gives you some discretion to do
13 so.

14 MS. JOHNSON: In 608 it gives you the discretion
15 to do so on cross-examination of the witness whose
16 truthfulness is being challenged or on cross-examination
17 of a witness who is vouching for the credibility of the
18 other witness. So if the mother --

19 THE COURT: Yeah, but you can't get it in by
20 extrinsic evidence.

21 MS. JOHNSON: That's the only two incidences by
22 extrinsic evidence. So if -- she can cross-examine the
23 victim about specific acts and if the mother were to get
24 up and say my daughter is a very truthful person, then she
25 could cross-examine the mother on those specific acts.

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1 THE COURT: If you put -- if you started -- if
2 you put truthfulness in play, --

3 MS. JOHNSON: Correct.

4 THE COURT: -- you know? I get that. Yeah, I
5 get that, too.

6 MS. JOHNSON: Those are the two exceptions for
7 608.

8 THE COURT: What did you say the first exception
9 was?

10 MS. JOHNSON: She can cross-examine the victim.

11 THE COURT: Yeah, but that's not extrinsic
12 evidence. That's my point. That's not extrinsic.

13 MS. JOHNSON: But on specific acts.

14 THE COURT: Yes, she can.

15 MS. JOHNSON: She can, yes.

16 THE COURT: Yes, I agree.

17 MS. JOHNSON: I agree.

18 THE COURT: Okay. Maybe I should be clear. I'm
19 not being clear. Yes, you will be allowed to ask the
20 Defendant --

21 MS. BAKER: The victim.

22 THE COURT: -- or the victim herself about
23 specific acts regarding her truthfulness, but if she
24 denies them, the specific acts, that's as far as that
25 goes. But now as far as opinion and character, you can

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1 bring in other witnesses to testify with regard to their
2 opinion -- with regard to her opinion or reputation, I
3 said character, opinion and reputation for truthfulness, I
4 will allow you to do that. If she puts into play the
5 truthfulness of the victim by vouching for her
6 credibility, then that witness who she gets that statement
7 from that she's an honest little girl you can say, well,
8 did you know she lied about this? Yes, you can do that
9 too.

10 MS. BAKER: I know that.

11 THE COURT: So those are the -- well, okay.
12 That's as far as -- okay. Well, that's what I'm saying.
13 That's my ruling.

14 MS. JOHNSON: There are two specific instances I
15 want to be clear about, the first being the Facebook one
16 that Ms. Baker just mentioned and the second --

17 THE COURT: Well, she can ask the girl about
18 that, but if the girl denies it, we're not gonna get
19 Facebook records out if that's what your question is.

20 MS. JOHNSON: And she cannot cross-examine the
21 mother on that.

22 THE COURT: Right. Okay, that's correct.

23 MS. JOHNSON: The second being there was an
24 accusation the victim's told -- actually Ms. Baker's
25 client that her stepfather was beating her mother.

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1 THE COURT: Wait a minute, wait a minute. Give
2 that to me again. What?

3 MS. JOHNSON: The victim told the Defendant --

4 THE COURT: Okay.

5 MS. JOHNSON: -- that her mother was being beaten
6 by her stepfather, and Ms. Baker can certainly cross-
7 examine the victim on that point but she cannot cross-
8 examine the mother on that point, she cannot have the
9 Defendant testify to that point, she cannot have anyone
10 else testify.

11 THE COURT: Well, that would be -- yeah, it's
12 extrinsic evidence. Extrinsic is something other than
13 what you're getting out of the witness themselves and I
14 will not allow it, but I will allow the cross-examination
15 of the witness herself.

16 Okay. Now are we done? I'm gonna rule on the
17 motion with regard to this incident that took place that's
18 referenced in the police report that was attached to the
19 submission by the prosecution. First of all, with regard
20 to the matter, you know, we get into this every time on
21 these things, the interplay between 768.27 and 404(B).
22 768.27 I find based on the rulings of the Supreme Court in
23 passing *Watkins*, 768.27, just so you know so we don't have
24 to beat this thing up every time, it trumps 404(B).
25 768.27(A) does by the Supreme Court's ruling and I don't

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1 see any material difference between 768.27 and 768.27(A)
2 in terms of its impact on the issue of whether or not this
3 is substantive or procedural, whether it interferes with
4 the Supreme Court's ability to make rules about the
5 admission of evidence and procedure in court. They're in
6 pari materia in that regard and so 768.27 does trump
7 404(B). Now, having said that, the Supreme Court was also
8 very clear when it ruled on 768.27(A) that it is
9 nevertheless subject to the scrutiny required by 403, and
10 that is whether or not the probative value is
11 substantially outweighed by the prejudicial effect.

12 Now with regard to this evidence that is being
13 offered here about this incident that occurred that the
14 Defendant related to the police following the
15 administration of his polygraph exam, the Court makes the
16 finding that the prior act must be relevant and the
17 prosecution is making the contention in this case that
18 it's relevant to his motive. I don't -- not based on what
19 this Defendant described. I don't find it is relevant to
20 a motive. His description is of an unsolicited, virtually
21 accidental activity that caused him to become sexually
22 aroused and I do disagree, however, with Ms. Baker's
23 reading that that wasn't the source of his sexual arousal
24 because he, according to the police report anyway that was
25 submitted, it said that Mr. Rainbolt told the officer this

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1 caused him to be sexually aroused, this referring to the
2 activity that the victim engaged in. And so that
3 definitely was the matter that did. But you know what? I
4 mean, if that's -- if that's offered to show somehow it's
5 relevant because it shows he was sexually attracted to
6 that victim, I mean ostensibly what this victim did
7 unsolicited, of her own volition without any input by the
8 Defendant, frankly anybody could have done and it may have
9 achieved the same result for this Defendant in this case.
10 It's not proof of a scheme or designed. It's totally
11 dissimilar. There's no penetration involved. You
12 correctly pointed out how that was a big distinction in
13 the *Watkins* case. I also realize that in the *Watkins* case
14 it was not only no penetration involved with this similar
15 act, it was also different victims, but in this case even
16 if you can say it's similar just because it's the same
17 victim, which I find is not a basis for saying it's
18 similar, these were totally different acts. One was
19 totally -- and the only -- now it may have been a
20 different event, okay? That event that happened, this
21 prior act, may have not gone down the way the Defendant
22 describes it, but the only evidence I have about how it
23 went down is the way the Defendant described it, so I have
24 to assume that's the evidence, and the evidence suggests
25 that it was unsolicited -- unsolicited, was not

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1 premeditated, there was no penetration involved, so it's
2 totally dissimilar. It was several years earlier, two to
3 three years at least earlier. It was an isolated
4 incident. There are obviously several intervening acts
5 that occurred in between. The only measure of -- the only
6 criterion in terms of admissibility for scheme, plan, or
7 design under *Watkins* that this would perhaps be supported
8 -- would perhaps support admission is it would reflect on
9 credibility to some extent, although remotely and,
10 secondly, it is reliable because the Defendant admitted
11 it. Other than that, it doesn't meet any of the criteria
12 in *Watkins* for admission for scheme, plan, or design.
13 I've already ruled as far as what I think it says about
14 motive, which is certainly any probative value is greatly
15 outweighed by the prejudicial effect of that information,
16 so under 403 I find that it is not admissible.

17 Okay. I think we're ready to roll.

18 MS. BAKER: Thank you, your Honor.

19 THE COURT: Now I do want to say we have a DOC
20 case, I believe, set for Tuesday also, so that obvious --

21 MS. BAKER: That case is newer than this one.

22 THE COURT: Yeah, but it's -- is it an in-prison
23 offense?

24 MS. JOHNSON: Uh-huh, it is.

25 THE COURT: So the 180-day rule isn't kicking in

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1 on that one then?

2 MS. JOHNSON: I don't think so.

3 THE COURT: Okay. Then this one would go.

4 MS. BAKER: It's an in-prison case.

5 THE COURT: Okay. As long as it -- it was
6 possession of a shank or something?

7 MS. BAKER: No, it's an assault on an Aramark
8 employee.

9 THE COURT: Okay, there you go. So that would
10 not be covered by the -- I won't worry about the 180-day
11 rule on that, so this case would be the priority case,
12 yes, agreed. McCoy pled, so you know that, so that's off.
13 I don't know anything about Duskman.

14 MS. BAKER: He's on bond, I think.

15 MS. JOHNSON: He's out on bond and Mr. Johnson
16 and I have talked about it, however with this case taking
17 precedence, we're not worried about that one.

18 THE COURT: Okay. Is there any possibility of
19 resolving that though?

20 MS. JOHNSON: I don't think so.

21 THE COURT: No?

22 MS. JOHNSON: No.

23 THE COURT: Okay. Okay, then. It looks like
24 Mr. Rainbolt is it. How long are we going to take to try
25 that, do we know?

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1 MS. JOHNSON: Three, four days?

2 MS. BAKER: (Indistinguishable.)

3 THE COURT: Wow. Okay. Really? Okay. All
4 right.

5 (Court adjourned at 3:30:14.)

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STATE OF MICHIGAN)
) SS
COUNTY OF MUSKEGON)

I, certify that this transcript, consisting of 21 pages is a complete, true, and correct transcript of the videotaped proceedings and testimony taken in PEOPLE V RAINBOLT, 14-64458-FC on October 3, 2014, Videotaped.

***Please note proper names and/or case names unknown to this reporter are spelled phonetically and may not be correct.*

Bobbie Springer

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